IS

TRIAL BY JURY

WORTH KEEPING?

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IS TRIAL BY JURY WORTH KEEPING?

THERE is a remarkable tendency in man to forget that all human institutions necessarily contain some portion of evil, and that the utmost which political sagacity can achieve is to establish and maintain those which involve the lesser portion. Most men are affected chiefly by the present; the past they never knew or have forgotten; the future they cannot discern or anticipate. Accordingly, after an institution has existed some length of time, many people, influenced only by the evils which they see and feel, unacquainted with those which it was created to remedy, and which will recur upon its abolition, become restless, and desire a change. At such a time it seems to be the duty of those who honestly believe that things should remain as they are, to state the gronnds of their belief, in order, if possible, to prevent others from rushing blindly upon ills which they know not of. It is true that the English, being a sensible and thinking people, not so easily convinced as some other nations, that what is a change is therefore an improvement, do not readily or often alter their habits or institutions. Nevertheless, this disease is so inherent in the minds of men, that even we are

not wholly free from it. The symptoms are different in different persons, but the malady is the same in all; and hence it is that some persons so afflicted are now to be found going about, announcing, in an oracular manner, that the system of Trial by Jury is not suited to the present age—is too cumbrous, tedious, uncertain, and, above all, too expensive; and they, therefore, propose, as the only alternative, to put it down, and to introduce a summary jurisdiction in its stead. It has also, by some, been proposed to do away with Grand Juries; certainly in London, probably elsewhere. These sentiments are not now confined to speculative philosophers or debating societies; they appear to have been adopted, partially at least, by such very practical persons as the Attorney and Solicitor-General, and by them have been brought before the Legislature. It is true that the whole measure of the Abolition of Trial by Jury has not been introduced at once: it may have been thought more discreet to administer it in small portions. Accordingly, in 1847, a Bill was brought in to subject to the summary jurisdiction of one paid, or two unpaid magistrates, all persons under the age of fourteen years charged with theft; and as this Bill seemed, on the face of it, not to be unreasonable, it passed without opposition, and became the law of the land.

Very late in the Session of 1849, in the month of July, another Bill was introduced, extending the

provisions of the former one to very many other persons, insomuch, that if that Bill had passed, between one-half and two-thirds of the prisoners over whose offences the Quarter Sessions still retain jurisdiction, would have been deprived of Trial by Jury, and handed over to a summary tribunal. This Bill, from some cause, was withdrawn. The Attorney-General, however, announced his intention to carry the measure, if possible, in the ensuing Session; so that, if he succeeds, and if the same proportion of prisoners is withdrawn, at equal intervals, from Trial by Jury, we may expect that, within eight or ten years at farthest, this ancient institution will be thoroughly extirpated.

It, therefore, becomes necessary for the public to know that this question, "*Is Trial by Jury worth keeping?*" has *now* to be answered. What the answer shall be, it is, of course, for the Legislature alone to say; but upon a question of such great importance, of so universal and vital an interest, every man of practical experience may venture respectfully to offer suggestions for the consideration of the Legislature, and to furnish materials which may assist Parliament in coming to a sound decision. It is, therefore, proposed, in the following pages, to consider,—*first*, the question of abolishing Grand Juries; and, *secondly*, to give to the measure of the Attorney-General a full and fair examination.

First, then—as to Grand Juries.

It has been urged that it is desirable to abolish them generally, and especially at the Central Criminal Court, on the following grounds:—because they are a useless expense, since, whenever stipendiary magistrates commit, there ought to be a trial;—because some witnesses in attendance are hustled and corrupted, and the testimony of others is liable to be suppressed or perverted;—because gentlemen in the City begrudge an absence from their business;—and, because some persons indict others for the mere purpose of extorting money from them. These reasons apply almost exclusively to the metropolis, yet they seem to be the principal grounds for this vast change in the criminal procedure of the whole country at large; and even these reasons appear to have undue weight assigned to them. For as to the inconveniences and mischiefs which London witnesses personally suffer, these arise, in great measure, from the execrably insufficient accommodation in the City Courts, and therefore seem to prove nothing but the necessity for improving those Courts, a matter which is both easy and obvious, and cannot be seriously expensive.

And, further, it seems difficult to understand how the suppression and perversion of testimony before the Grand Jury could not be prevented, by the attendance of an intelligent officer, entrusted with the depositions, as effectually as they can be now prevented before the Court itself.

With respect to the time employed (it cannot be

called lost) by men of business, that is only what their fellow citizens have a right to expect from them. No class can fairly claim to be wholly released from the duties of a citizen. A shopkeeper's time is as valuable to a shopkeeper as a merchant's to a merchant; and were the latter class released from attending as Grand Jurymen to inquire, there can be no reason why they should not be compelled to attend as Petty Jurymen to try—an occupation quite as tedious, and probably quite as distasteful.

The last of the above reasons is, that the Grand Jury is used as an engine to extort money. Of this, the instances given seem to consist almost wholly of cases where parties are charged with keeping gambling or disorderly houses. Where such parties are really innocent, a Petty Jury in the Civil Courts will give ample compensation in damages. Where they are guilty, perhaps the Legislature may be of opinion that the disputes between gamblers, keepers of houses of ill-fame, and speculative informers, need not be set at rest by the abolition of the Grand Jury, an institution which Lord Somers has entitled the security of Englishmen's lives, and which, in fearful emergencies, has done the nation incalculable service. But even were the London Grand Juries admitted to be objectionable and needless, the institution, as actually working in the counties of England, demands a wholly different consideration. In the counties there are no stipendiary magistrates, no

complaints from the jurors of the labour and expense of attendance, nor of bills of indictment being used as engines of extortion—no allegation as to discomfort or corruption of witnesses.

In order, therefore, to understand rightly the real nature and value of the institution in a legal and national point of view, it will be well to consider it apart from these accidental hindrances which seem to embarrass its beneficial working in London.

By the summoning of the Grand Jury to meet the Judges at the Assizes,* there are called together twice a year in each county, the men who are chief in station and influence, men to whom the administration of the law as magistrates, and much of the local taxation is entrusted, who, from those causes, must have most power to work good or evil to the land in which they live. The mere circumstance of all these persons being brought into contact with each other for several days, twice every year, for common public purposes of such importance, without any reference to its effects upon their own social intercourse as individuals, is an inestimable good. Prejudices and false impressions are corrected, the exigencies and improvements of all parts of the county communicated; projects for amendment discussed; intelligence extended. If the knowledge of any local good exists, it may be diffused; if any great public evil presses, means

* What is said of the Grand Jury at the Assizes applies, *mutatis mutandis*, to the Grand Jury at the Quarter Sessions.

for removing or abating it may be suggested. Throughout the Kingdom the circumstances and conditions of each county are brought to the intimate knowledge of those who are perhaps the most interested in the general welfare.

But this is not all. The Grand Jurors thus appearing before the living repositories of the law, are instructed by the charge of the Judges as to the nature and importance of their duties. Does any matter of grave interest require the public care, it is duly laid before them and commented upon, temperately, wisely, comprehensively. They are accurately informed as to the existing state of the law in the cases which they have to determine. And by attending in Court they have an opportunity of seeing that law administered by its highest functionaries. Can it be reasonably doubted that such opportunities are beneficial?*

Further, should there be any great public grievance, it is their province to present it, and to devise or suggest fitting remedies. The mere fact

* The modern practice is in truth substantially the same as is picturesquely described by Sir Thomas Smith in his Commonwealth of England, 1565. "In the towne-house or in "some open or common place there is a tribunal or place of "judgment made aloft upon the highest bench. There sit the "Judges which be sent down in commission in the midst. Next "on each side sit the Justices of Peace according to their degree. ". . . . . Then the cryer cryeth and commandeth silence, "one of the Judges briefly telleth the cause of their coming and "*giveth a good lesson unto the people.*"

of this responsibility being laid upon them, the ensuring of their presence in their counties, the necessity for impartial patient inquiry and business-like habits cannot but raise their character, and increase their powers of usefulness. Moreover the subject matter on which they are employed is the public interest and the law of their country. They obtain a knowledge of the law which they have to administer. Without such knowledge and administration that law would excite in them comparatively little interest or affection: and they would be less capable of either maintaining or improving it. These men return to their homes, and in greater or less degree, form centres for the circulation, each in his own neighbourhood, of all which they have learned that is useful, for the correction of all which they have discovered to be erroneous. Were an imaginary commonwealth to be framed, could any better means be devised for instructing the minds, raising the character and forming the habits of the gentry of a nation, and through them of the whole community; for ensuring, as far as is possible by human means, a body of able, useful, intelligent, zealous, yet temperate and conscientious citizens? How far the difference between the character of our gentry and that of the corresponding class abroad, may be affected by this discipline, is worth the earnest consideration of every thinking man.

But let us now consider the Grand Jurors in their capacity of public prosecutors, as the persons

through whom in the case of indictable offences, the executive must act, and without whose consent the Crown is powerless to punish. In most other countries the administration of the Criminal Law is kept entirely in the hands of the Crown—the executive institutes the inquiry as well as executes the sentence. In England the executive cannot treat the subject as a criminal except through the medium and with the sanction of at least twenty-four of his fellow subjects, twelve Grand Jurors, and twelve Petty Jurors.* The Grand Jurors form the first bulwark between the Crown and the people; moreover as they may thus prevent the Crown from tampering with the rights of the subject, so they may also enable the subject to assert his rights without the aid, or even in opposition to the Crown. For through their channel any subject may commence a prosecution for any offence without any preliminary proceeding: thus, where a single magistrate, appointed and paid by the Crown, may from ill-advice, or timidity, or partiality, or any other cause, decline to entertain a charge, the complainant may at once resort to the Grand Jury of the country, a body on whom such causes are not likely to operate, and call upon them to determine the propriety of instituting a trial. Nor is this a mere theoretical right; such cases occur much more

* "The institution of the jury deprives the sovereign of that terrible weapon, judicial power; and makes it impossible for him to govern, and cause himself to be feared by the menaces of his tribunals."—*Sismondi Etudes sur les Sciences Sociales*, t. i. p. 115.

frequently than people commonly suppose,* and serve to illustrate the nature and value of the institution even on ordinary occasions, and in comparatively unimportant matters.

But when the country is torn to pieces by party feeling in politics, and civil dissension,—a condition which we may always at intervals expect, and which nothing but gross want of foresight would leave unprovided for—then springs up a new and extensive class of cases in which the intervention of the original jurisdiction of the Grand Jury becomes of infinitely greater importance, and that even supposing the character and constitution of our magistracy to remain as they are. But are we sure that they will remain so? One of the novelties lately suggested has been

* "I may perhaps be permitted to mention another instance which has lately come within my knowledge, shewing the importance of Grand Juries not being abolished. A person named Travers was tried at the Central Criminal Court, in August last, for manslaughter, in killing another man in a fight. An inquest was held at Westminster, and the Jury found it manslaughter. Travers (the party accused) was taken before a police-magistrate, who expressed his surprise that any Jury should have come to such a conclusion, and refused to concur in his commitment. Travers was, however, committed on the Coroner's warrant, and tried and convicted, and sentenced to nine months' imprisonment.

"Permit me to ask, if there had been no Grand Jury, and the Coroner's Jury had been subservient to the police magistrate (as proposed by the Criminal Law Commissioners), would the ends of justice in that case have been promoted or totally defeated?

"I am, Sir, your most obedient servant,

"WILLIAM PAYNE.

"Temple, Nov. 22, 1849."

Extract from a letter in the "Times Newspaper."

the appointment by the Crown of a Public Prosecutor for all cases.* Some persons also are sanguine enough to anticipate the substitution of Magistrates, also paid and appointed by the Crown, in place of the gentry throughout all England. Has any one who advocates these changes really contemplated the situation in which they would place the nation, shut out by the abolition of the Grand Jury from procuring even the means of investigation and trial, except by the channel of paid agents of the Crown. A Public Prosecutor and a Stipendiary Magistrate depending for their daily bread upon the Ministry of the day. Imagine a state of political excitement, such as none of us are so young as not to have witnessed, an indiscreet Ministry, resolute to shelter their own functionaries against some popular charge, and large bodies of the people clamorous, excited, but unable according to law to procure a trial. Will the people of England

* The writer has been favoured by Lord Brougham with some remarks on a previous edition of this pamphlet.

His Lordship is of opinion that it is highly desirable to maintain the institution of the Grand Jury; but that there ought also to exist a Public Prosecutor. Because, at present, any evil-minded person, uncontrolled by cross-examination or inquiry, may make the Grand Jury the instrument of his own malice. Because a Public Prosecutor being individually responsible, and subject to the check of professional and popular opinion, would not venture to act upon partizan, or political bias. Whereas the Grand Jury are wholly irresponsible, since their proceedings are secret; and it is not known whether they were unanimous, or if not unanimous, who constituted the majority.

allow themselves to be subjected to these perils? Will the gentry tamely surrender, or meanly abandon so noble a privilege? Would any man in his senses deliberately destroy such a national safety valve, simply because, under the very peculiar circumstances of the metropolis it is found on ordinary occasions to be cumbrous and inconvenient, and perhaps even to some insignificant extent mischievous?

Secondly, We now proceed to consider the nature and tendency of the Bill brought in by the Attorney-General.

According to a practice in modern legislation, certainly easy—but extremely slovenly, and often producing great perplexity and confusion—the measure is not complete within itself; indeed, it contains scarcely any of the provisions which are really its own; and in order to ascertain what they are, we must refer to another Statute, the Statute of 10 & 11 Vict. c. 82, commonly called "The Juvenile Offenders' Act," by which "to ensure the more speedy trial of Juvenile Offenders, and to avoid the evils of their long imprisonment previous to trial," one paid, or two unpaid Magistrates, are empowered summarily to convict persons charged with simple larceny, whose age does not exceed fourteen years, and upon conviction, to punish them by imprisonment for three months, and by whipping: Also to order the restitution of the property stolen, or the payment of a sum equal to it in value.

The Bill of the Attorney-General, after reciting that "the expense and delay sustained in the prosecution of persons guilty of petty thefts tend to the increase of such offences," extends the provisions of that Act to persons of sixteen years of age, and, with the exception of whipping, *to persons of any age* "charged with having committed, or attempted to commit the crime of larceny, where the value of the article stolen or attempted to be stolen shall not, in the opinion of the Justices, exceed five shillings."

By the returns made by the Clerks of the Peace throughout England, it appears that the proposed Bill applies to between one-half and two-thirds of the prisoners now tried at Courts of Quarter Sessions. Now we do not here seek to impugn the justice or policy of the Juvenile Offenders' Act.* For children, in the very nature of things, are subject to summary jurisdiction. A parent is invested by nature with the office of a judge, jury, gaoler; and was by the Roman law, even with that of executioner. Moreover, from time immemorial, the Common Law has always dealt differently with persons charged criminally under the age of fourteen. Sir Matthew Hale says, "that in the reign of Edward III., the age of fourteen was fixed upon as the age at which persons can discern

* See, however, "Summary Jurisdiction," by Mr. Sergeant Adams, Assistant-Judge of the Middlesex Sessions, in which the author adduces many facts and arguments in support of a contrary opinion.

between good and evil, and therefore may be deemed criminally responsible." Thus the law, in the case of these children, has only invested the magistrates with the authority of a parent, of whose care death or crime has often deprived them. The law has also provided a prison* where the youthful culprit is educated as well as punished. But the summary trial of grown men is a wholly different matter; *primâ facie*, they have equal rights with any other member of the community: and therefore, before we deprive them of these rights on the score of a money saving, we must be fully satisfied—First, that the measure is not only not bad, but is absolutely good: Secondly, that it is at least as good as trial by Jury. For, since in its practical working it will be confined exclusively to one class of the community, and that the lowest, who will not profit by the saving, it is of immense importance to see that the members of that class have the same sort of justice dealt out to them as is provided for their richer fellow subjects. This is really so vital a matter, that too much attention cannot be bestowed upon it.

Now it is a matter not known to the multitude, and hard to be understood by the shallow, that the forms of our law are devised rather for the protection of innocence than for the detection of guilt. Guilt, on the whole, is easily detected; and if, by reason of these forms, some guilty men escape, no great harm is done to society, compared with the

* Parkhurst, in the Isle of Wight.

grievous injury caused by the conviction and punishment of an innocent man.* By a nation so sensitive about justice as the English, such a disaster is viewed, and rightly so, as a public calamity. All society feels a shock, and has its confidence in the law shaken. And a conviction, be it never forgotten—whether it be summary, or the result of a solemn trial by jury—is ruin, irretrievable ruin. Now there can be no doubt that a summary tribunal is less favourable to parties charged before it, than a trial by jury. In the nature of things, it must be so. The accused has no opportunity of preparation; the accuser is not confined to the particulars of a written charge; fewer heads are brought to the consideration of the

* "That it is better one hundred guilty persons should escape, than that one innocent person should suffer is a maxim that has been long and generally approved; never, that I know of, controverted."—*Letter to Benjamin Vaughan, Esq., by Benjamin Franklin.*

"It should be recollected, too, that the object of penal laws is the protection and security of the innocent; that the punishment of the guilty is resorted to only as the means of attaining that object. When, therefore, the guilty escape, the law has merely failed of its intended effect; it has done no good indeed, but it has done no harm. But when the innocent become the victims of the law, the law is not merely inefficient,—it does not merely fail of accomplishing its intended object,—it injures the persons it was meant to protect; it creates the very evil it was to cure, and destroys the security it was made to preserve."—*Observations on the Criminal Law of England, by Sir Samuel Romilly, Note D.*

matter.* And hence it is, that almost all the cases which are now simply committals for trial, would, under a system of summary jurisdiction, have been convictions for punishment. There are few instances in which magistrates are not strongly of opinion that a party committed by them ought to be convicted; and their brother magistrates, especially those coming from the same neighbourhood, very freely adopt their opinion. Nevertheless, no Assizes or Sessions ever occur, at which, even though all the witnesses attend, some bills are not thrown out by the Grand Jury; and among those found are frequently cases in which the Judge or Chairman holds that there is not sufficient evidence to put the accused upon his defence. Lastly, there is always a certain number of persons acquitted by the Petty Jury at the trial. Now is any one prepared to stultify all these solemn acts in favour of the accused?—to assume that all those whom the law has thus pronounced to be innocent, were guilty, and by one blind enactment to consign, for the future, all such persons to conviction and punishment? Surely it is wise and fair to reflect that persons of the class of Petty Jurors are in many inquiries often aided by their own experience. For instance, whether the corn or potatoes found in the prisoner's cottage correspond in quality with those stolen from the farmer; or whether he who has bought an unfinished article of manufacture must be

* "The essence of a jury is unanimity."—*Sismondi, Etudes sur les Sciences Sociales*, tom. 1. p. 121.

presumed to have known that it was stolen. Moreover they understand the habits of the lower orders better than magistrates can, and for that very reason are able better to appreciate the circumstances of the case, and to determine whether a wrongful taking was a theft, or merely such an act as the greater degree of license among the lower orders might permit to be done.

How often does it happen that the quicker and somewhat technical sense of felony existing—not only in policemen, but even in magistrates and judges, is neutralised by the invaluable steadiness of a refractory jury.* And "if it be alleged that an obstinate juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape from party or from personal bias, it must on the other hand be borne in mind that this is a small price to pay for the perfect security which a jury

* "A Christian judge in a free country should respect, on every occasion, those popular institutions of justice, which were intended for his control, and for our security: to see humble men collected accidentally from the neighbourhood, treated with tenderness and courtesy by supreme magistrates of deep learning and practised understanding, from whose views they are perhaps at that moment differing, and whose directions they do not choose to follow; to see at such times every disposition to warmth restrained, and every tendency to contemptuous feeling kept back; to witness this submission of the great and wise, not when it is extorted by necessity, but when it is practised with willingness and grace, is a spectacle which is very grateful to Englishmen, and which no other country sees."

Sidney Smith's Works, vol. iii. p. 204.

affords to all men, even to the humblest."* Moreover, in this tribunal exists a faculty peculiar to itself, and all-powerful for the protection of the accused, for "Not only are Juries in fact the real judges in England, but they possess a power which no judge would venture to exercise; namely, that of refusing to put the law in force. Undoubtedly, this is a very dangerous power, more especially as judges consulting in secret, deciding without being afterwards responsible, are free from all control but that of their own conscience. Yet, exercised, as it has been, with temper and moderation, the discretion of juries has proved extremely salutary. It has been the cause of amending many bad laws, which judges would have administered with exact severity, and defended with professional bigotry; and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made cannot long prevail in England."†

All these safeguards are utterly demolished by the system of summary conviction, and not only so, but new perils are created. The one great maxim of the Criminal Law of England, a maxim which distinguishes it very remarkably from that of most other civilized nations, is the short but comprehensive rule, "*Nemo tenetur prodere seipsum*"—No

* Political Philosophy, by Lord Brougham, Part III. c. xxi. p. 389.

† Essay on the History of the English Government and Constitution, by Lord John Russell, p. 394.

man is bound to betray himself. "For at the Common Law," says Blackstone, "a man's fault was not to be wrung out of himself; but rather to be discovered by other means and other men." Yet it is notorious, that the habit of interrogating prisoners to their destruction is rooted irremovably in the minds of policemen and constables, and not unfrequently shews itself in that of magistrates, notwithstanding the reiterated charges of Judges, and the unceasing remonstrances of the Bar. But under a system of summary jurisdiction, the magistrates will be practically irresponsible and uncontrolled. They will be safe from the animadversions of Judges, and safe from the remonstrances of the Bar, for they will have no Bar before them. This latter circumstance, though perhaps not always unpleasing to the magistrates, may be fatal to the accused. In Courts, constituted as they now are, the mere passive presence of the Bar ensures a fair, regular, and full trial. But there are few prisoners so destitute of money or friends as not to be able to obtain the assistance of a Counsel of their own choosing. And it often happens, where they are so destitute, that the Court assigns a Counsel, who defends the prisoner gratis. Now, no one in the habit of attending Courts of Justice can have failed to observe the altered appearance which the evidence of a witness presents after he has been subjected to a cross-examination, even of the simplest kind. "Where there has been opportunity for all persons concerned, namely, the Judge or any of the Jury,

or parties, or their counsel, or attornies, to propound occasional questions, which beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge, without being interrogated."* And this is especially observable with regard to evidence of that dangerous class commonly given by a policeman or constable, speaking to conversations had with the accused. It is the habit of those persons to deliver what they have heard in a shape somewhat different from that in which they received it. The explanation of this is obvious. They can scarcely be expected to remember every word, and yet they take a natural pride in being thought to do so. Hence it comes that they digest in their minds, more or less crudely, the communications received, and then produce some inference which they have drawn from them, instead of the actual words used by the accused. And it often needs the subtle analysis of a close cross examination to detect the original words uttered by the unfortunate prisoner. Thus the fatal expressions "He admitted to me that he stole it," "He said that he was guilty of the offence charged," appearing in the depositions of the policeman, frequently come out in the harmless form of "I know I took it," or "I am guilty of taking it, but I never meant to steal it." "I thought I had a right to it."

But this power of cross-examination so invaluable to the accused, will practically be taken from

* Sir Matthew Hale's History of the Common Law, c. iii. p. 291.

him by the proposed Bill, and with it will also be taken away all the benefit of the remarks of Counsel upon the evidence, and his watchful exclusion of any evidence that ought not to be introduced. How capricious is the spirit of legislation! It is but thirteen years ago that the Legislature solemnly declared it to be just and reasonable* that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them. And proceeded to enact that every prisoner should be thenceforth entitled to a full defence by Counsel, thereby altering in favour of prisoners, a practice, which though it had existed from the earliest times, was justly deemed a disgrace to the criminal law of England. Yet now by this indirect enactment will this admirable statute be wholly repealed in the case of nearly two-thirds of the persons accused of crime throughout England.

Lastly, Let it be ever remembered that this summary tribunal of one paid or two unpaid magistrates is to be considered so faultless that its decisions cannot be reversed, or even questioned. The Attorney-General has given to the convicted person no power of appealing to any other tribunal whatever! Convictions cannot be removed into a Superior Court; for by the tenth section of the Juvenile Offenders' Act the right of removal by certiorari is taken away, and by the form of the conviction given in the schedule all the evidence upon which it was

* Stat. 6 & 7 Will. 4. c. 114.

founded is suppressed, and the bare fact stated, that A.B. has been convicted. Yet even for the most insignificant offences it has ever been held necessary to set out the evidence on which the conviction is founded, unless otherwise provided for by special enactment. So that at a time when the authority of Magistrates is enormously extended, when they are made Judge and Jury over persons charged with felony, they themselves are rendered almost irresponsible, and their decisions irreversible. And the only means of even forming an opinion whether the facts before them justify their conclusions are carefully removed. This, too, at a time when it has just been thought necessary to establish a Court of Criminal Appeal to which all persons now convicted by a Jury even before a Judge of the land may resort without one farthing of expense. From such advantage far more than one-half of them are henceforth to be shut out. Why? Because there is to be created a strange sort of pecuniary qualification for the right of a trial by jury, and a novel doctrine to be propounded, that the greater the crime, the more merciful shall be the law, the less the crime, the more promptly and severely shall it be dealt with.

But it will be said that the Bill provides an option for the accused to elect a Trial by Jury. They need not be tried summarily unless they choose. Is it supposed that this option will be universally or generally exercised? If it will, then this measure will simply be a wanton inter-

ference with established institutions to no purpose. If not, then the option will be no protection. But has the nature of this option ever been considered? How is the case to be put to the accused? Are they to have all the *pros* and *cons* of the two tribunals laid fully and clearly before them? Will they be told of their right in the one case to a copy of the depositions—to a written indictment—to challenge the Jury—to be defended by Counsel—to have the facts summed up aloud by the Judge in open Court, before the assembled country—to have those facts then determined by the Jury—to have any matter of legal doubt reserved for the consideration of the Judges of Westminster Hall? Will it be explained to them, that in the other they will be deprived of all these advantages? In truth, except in case of hardened old thieves, the option will be practically "the option of an oyster, whether he will be opened or not." Imagine the sort of scene which will be enacted in what must be termed by courtesy "the Justice-room." There will be seen an ignorant, frightened, boorish prisoner, without Counsel or Attorney, muttering to the policeman who has him in charge, the policeman whispering in reply, "You had better let their Worships settle it. If you go to trial you must be locked up any how, and may be for a longer time than their Worships would give you altogether." "You little know what it is to go before a Judge." Can any one say that under such cir-

cumstances there would be any exercise of understanding or election whatever ?*

But there is another most important provision of the Juvenile Offenders' Act, which, by incorporation into the proposed Bill, is to be extended to nearly two-thirds of the grown men charged with felony throughout the land. The first section of the Act provides, "that if the Justices, upon hearing any case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for future good behaviour, or without such sureties, and then make out and deliver to the party charged a certificate in the following form:—

to wit. "We, of her Majesty's Justices of the Peace for the County of [or I, a Magistrate of the Police Court of *as the case may be*] do hereby certify, that on the day of A.D. at in the said County of *M. N.* was brought before us, the said Justices, [or me, the said Magistrate] charged with the following offence (that is to say), [*here state briefly the particulars of the charge*] and that we, the said Justices [or I, the said Magistrate] thereupon dismissed the said charge. Given under our hands, [or my hand] this day of ."

Thus it appears that the above certificate is to be given to the parties charged in two cases: one,

* Some years since a Society was formed for sending out foundlings to the Cape, as servants to the Boers. The foundlings were to have their option—the proceeding was to be wholly voluntary, therefore it could not be abused—of course it was said that the matter was fully explained to them before they

where he is deemed innocent; the other, where he is deemed guilty; but in the opinion of the Justices, "it is not expedient to inflict any punishment!" So that any man whatever, though clearly proved to have committed a felony, may by this Bill, at the discretion of a Magistrate, on the grounds of expediency, not only not be punished, but may leave the Court without any security for his good behaviour, and with a certificate in his pocket under the hand of the Judge, stating *that the charge was dismissed.* And in order to set such a person quite at ease for the future, the 3rd section of the Act provides, "that every person who shall have obtained such certificate of dismissal as aforesaid, shall be released from all further or other proceedings for the same cause."

Let us for a moment consider this frightful amount of irresponsible authority entrusted to two country Magistrates over the far larger portion of persons charged with offences throughout England. It is, in truth, nothing less than *a complete dispensing power over the laws*, placed in the hands of persons nominated by the Crown—a power by them to be exercised, without appeal, in the thousand and one different ways in which their varying discretion may interpret the word "expedient."

made up their minds: however, a visitor one day chanced to witness the process of the option. A foundling made his election—he expressed his willingness to go, but added, "I suppose I shall be allowed to come back at night." So much for the notable device of an option for the uneducated.

Well says Lord Camden, "The discretion of a Judge is a law of tyrants; it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable." Has a man a large family? it will be expedient to give him a certificate of dismissal, lest the family should be thrown on the parish. Is a magistrate timid, partial, easy tempered, harsh, or vindictive, anxious to save the rates of his parish, or to preserve his own game? Certificates will be variously given or refused in various places, according as these various humours prevail. Or they will be thought to be so given or refused, and odious comparisons made, wholly destructive of popular confidence in the administration of justice. Will it be said that Magistrates may be expected always to act with good faith and upright intention, with perfect intelligence, and ability, will never be deceived or misinformed by a venal, designing, or ignorant clerk? What then? are we to legislate on such complimentary assumptions? "Laws," says Junius, "are intended not to trust to what men will do, but to guard against what they may do." Suppose, however, there should be found persons of a temper confiding enough to entrust this enormous power to the now-existing magistracy. Yet, who is to answer that the members of this body hereafter will be such as they are at present? For it must be remembered that the power

is to be bestowed upon a permanent official body, not upon transitory individuals. And herein exists another most important distinction between summary jurisdiction and the mode of trial which it is intended to supersede. It has been observed by an acute foreigner, that "Juries do not form among themselves a permanent body who may have had time to study how their power can serve to promote their private views or interests. They are men selected at once from among the people, who perhaps never were before called to the exercise of such function, nor foresee that they shall be ever called to it again." "The main object of the institution of trial by Jury is to guard accused persons against all decisions whatever from men invested with any permanent official authority."* "A Jury always calling upon different men to determine the fate of their equals, prevents that carelessness, that habit of distrust, or that insensibility which may be produced by the office of a Judge."† One great merit of the institution is that it possesses "judicial power to accomplish every intended purpose," and yet is "in the hands of nobody."* But suppose this power to have been exercised—suppose a certificate given. Let us consider the position of a fortunate guilty man, whom the Justices, from some unknown cause, think it expedient to dismiss with this certificate. He has committed a felony—is tried and

* Delolme on the English Constitution, pp. 173, 183, 184.

† Sismondi Etudes sur les Sciences Sociales, tom. 1. p. 115.

found guilty, and dismissed scot free! No record is kept of his guilt—he is furnished by the tribunal which tried him, with a certificate which, if it means any thing at all, is apparently evidence of his innocence. Compare the position of this guilty man thus favoured by the Justices, with that of a person found guilty by a Jury of stealing property to the value of six shillings. The Judge may perhaps think it a trifling case, and deem it not expedient to inflict any punishment on him; but he is a felon notwithstanding,—he is tried before the face of the assembled country,—publicly found guilty by twelve men,—publicly recorded to be a felon. And further, he is told that if he is found guilty again, he will be liable to be transported. Of these two parties it is possible that the latter may be the lesser rogue, though the article which he stole seemed to two Justices to be worth one shilling more. Such are the consequences of fixing a money standard of crime!

But it will be well to examine this part of the subject more generally for whatever might be the working of this provision of the Bill in any specific case, there can be no doubt that its general effect on the lower orders, and through them, on the community, would be most pernicious. As soon as it becomes generally known that a man may commit a five shillings larceny, and yet have a certificate of dismissal as if he were innocent, from that moment the standard of honesty will be lowered throughout the kingdom. It will be viewed as a public de-

claration of the Legislature, that a five shilling larceny is a trifling matter—not exactly a felony; but more like any other subject of summary conviction, such as a common assault, or angling in the day-time, or poaching, or vagrancy, or any other offence which causes little injury to any one, and little or no disgrace to the offender. Indeed, it will be thought even less criminal than any other subject of summary jurisdiction whatever, for it will be the only crime in the Statute Book of which an Englishman can be found guilty, and yet treated in every single particular as though he had been proved innocent. With such a law, and such a morality growing out of it, we need not pause long to consider how they will affect *the security of the property of the poor!* Five shilling thefts are almost always committed upon the poor. How very seldom is a Squire or a Merchant robbed of any thing worth only five shillings. Can there be a moment's doubt that every cottage throughout the kingdom, insecure as it is now, would by this Bill be rendered much more insecure. Petty thefts will hardly be considered as stealing, and acts which are now deemed infamous by all classes, and are invariably distinguished by prisoners, and by all the lower classes from subjects of summary jurisdiction, losing that distinction, will soon cease to be infamous, and so become common. Yet this measure is professedly devised to prevent the "increase of such offences!"

Is it possible to overstate the importance of such

results, whether we look to the honest poor who are to be protected, or to those who live on plunder, and are now viewed as felons, and punished as felons, whether they steal five shillings or five hundred pounds?

It may, in passing, be remarked, that the period for introducing this measure is not a little singular. About twenty years ago, the Legislature, at the suggestion of Sir Robert Peel, solemnly revised the whole Criminal Law, and one of their first acts was to abolish the distinction between grand and petty larceny, as not being grounded on any sound principle, and as tending to confound the distinctions between right and wrong. Accordingly, the offences were made identical, and the offender subjected in either case to the like punishment. How came these eminently wise and judicious alterations not only to be wholly repudiated, but a measure proposed which will revive all the evils then got rid of, and increase them a thousand fold? And how comes another distinction to be introduced that never existed before, namely, a different mode of trial?—It is obvious that the intricacy of the facts, and the difficulty of applying the law to them, are in no wise influenced by the value of the property stolen. Stealing an egg may be quite as intricate, or quite as simple an act, as stealing a watch. And as to questions of law, it is notorious that some of the most perplexing in the books relate to property small in amount; so that if summary jurisdiction is ever let in at all,—if it is proper to

apply it to small thefts, it may fairly be said, why not apply it to large? Why not to all offences whatever? It would be difficult to furnish any answer to these questions, if the principle were once admitted and applied. It is therefore of the utmost importance to oppose it in the beginning, and not to let in the narrow end of a wedge which, when once driven home, would split off what we may well call the fairest part of the Constitution. For "It is to trial by Jury, more even than by representation (as it at present exists,") (1823) "that the people owe the share they have in the government of the country; it is to trial by Jury also, that the Government mainly owes the attachment of the people to the laws; a consideration that ought to make our legislators very cautious how they take away this mode of trial by new, trifling, and vexatious enactments."*

Let us now inquire whether, in the history of our law, any precedent can be found for such a measure as the present. It is true at a very early period the Sheriff in his Court heard and determined cases of theft, and all other felonies except homicide. But his jurisdiction was not summary. The Common Law, with all its defects, never entrusted the liberty of the subject to the capacity or incapacity, the prudence or imprudence, the

* Essay on the History of the English Government and Constitution, by Lord John Russell, p. 394.

caution or the haste, the knowledge or the ignorance, of a single almost irresponsible man. The Sheriff was an officer of dignity and importance, not biassed by the prejudices of a single neighbourhood. He went his circuit, and presided over a Jury. Nevertheless, even this tribunal was found to be so bad, that by the 17th chapter of Magna Charta, the Sheriff was for ever forbidden to hold Pleas of the Crown, for the very reasons that Magistrates ought to shrink from doing so now; because, in the language of Sir Edward Coke, "*Ignorantia judicis est sæpenumero calamitas innocentis.*"* The ignorance of the Judge is often the destruction of the innocent. There is, however, one precedent more expressly in point, only one; but of what men, and of what times! The Ministers of the day were Empson and Dudley, and their master was Henry VII. By the Statute 11 Henry VII. c. 3, "Justices of the Peace were empowered," says Sir Edward Coke,† "upon information only, without any presentment, or trial by Jury, being the ancient birthright of the subject, to hear and determine the same." But the Act did not go the length of the present measure, nor did it long remain in force. Its operation was expressly restricted from extending to cases of murder, treason, and *felony*; yet it is said to have caused such "insufferable pressures and oppressions" upon the

* 2 Inst. 30. † 4 Inst. 41.

subject, that it was repealed in the first Parliament after the King's decease. Sir Edward Coke adds, that he has "recited the Statute, and shewed the just inconvenience thereof to the end that the like should never be attempted again in any Court of Parliament."

But it will be said that this present measure only proposes to entrust the Magistrates with the smallest possible amount of power—imprisonment for a short and definite period. But if the Magistrate abuses that little power, what then? No great harm done, must be the answer. Detestable doctrine! If punishment is to be efficacious, it must be severe enough to deter not honest, but dishonest men from crime. But be the punishment what it may, and the lighter it is, with so much the less caution will it be inflicted: still to an innocent man it will be destruction, simple ruin, neither more nor less, to him and all who depend upon him. But such persons usually come from the lowest class of the community. What then? Is any class, simply because it is low, to be handed over to two Justices as a subject of legal experiment? *Fiat experimentum in corpore vili* has hitherto never been applied to the liberties of a British subject. Why then is any Englishman, when charged with a felony, to be deprived of an Englishman's birthright, and his liberty (his only inheritance) to be tampered with by two practically irresponsible men, who in no sense of the word are his peers?

The preamble of the Bill says, to save "expense and delay," but there cannot be a more dangerous delusion in politics, than to suppose an institution good because it is cheap, or bad, because it is deliberate, or even tedious. "If we examine," says Montesquieu,* "the set forms of justice with respect to the trouble the subject undergoes in recovering his property, or in obtaining satisfaction for an injury or affront, we shall find them doubtless too numerous: but if we consider them in the relation they bear to the liberty and security of every individual, we shall often find them too few, and be convinced that the trouble, *expense*, *delays*, and even the very dangers of our judiciary proceedings, are the price that each subject pays for his liberty. In Turkey, where little regard is shewn to the honour, life, or estate of the subject, all causes are speedily," and we might add, cheaply "decided." But, even were it ever so cheap, can there be a more mean or odious thrift than that which seeks to save the pockets of the rate-payers who have voices in elections at the expense of the inherited rights and liberties of those who have not? Does it proceed from a real love of sound judicious economy, or is it merely a sacrifice to that opinion which Hobbes† notices as one of the indications of the approach of the civil commotions when by a very simple test "he was

* De l'Esprit des Lois, liv. 6. c. 2. (Nugent's translation.)

† Behemoth.

thought wisest and fittest to be chosen for a Parliament that was most averse to the granting of subsidies or other public payments." The following considerations may serve to furnish an answer. Formerly the expenses of prosecutions were defrayed wholly out of the County rates. While this was so, no credit could be earned for the existing Government, no better appearance made in the yearly revenue, by reducing them. And hence it was that our pockets so long remained unprotected, and our institutions unassailed. But now for some few years past, all these expenses have been defrayed out of the Consolidated Fund, which is barely sufficient for the demands made upon it. And great reduction being impossible in the Army or Navy, and persons with salaries being always very unpleasantly restive on any attempt made to reduce them, Trial by Jury seems to have been pitched upon as a subject for economy, which will be both safe and easy, so long, at least, as the experiment is confined to the most defenceless class of the community.

Let us, however, dismissing the question of expense, and the details of the Bill, more especially as they operate upon the accused, now proceed to consider what will be the effects of the measure upon the community generally; and especially upon that class which furnishes Petty Juries. Jurors are often regarded merely as machines for the purpose of obtaining a correct decision. This is the obvious, shallow, and there-

fore common view of the institution. No doubt it is extremely desirable and important that Jurors should decide correctly. But criminal trials cannot be likened to mathematical or chemical analysis, where an accurate result being the sole object, it is comparatively indifferent by what means that is obtained. On the contrary, in a system of criminal procedure the means are often as much to be considered as the ends. It is perhaps of equal importance, nationally and politically at all events, to get a verdict in the right way —as to get a right verdict. Observing foreigners know this well, and regard Jurors not solely with reference to their verdict, but also, and hardly less, with reference to themselves and the community.* Perhaps one of the greatest advantages of Trial by Jury is the training, moral and intellectual, it

* "This institution has caused a respect for the law, a love of justice, and a careful study of the human heart to descend among all those classes of citizens whom it has summoned upon Juries; it has made jurisprudence more simple, and more clear." —*Sismondi Etudes sur les Sciences Sociale,* tom. 1, p. 117.

"The institution of the Jury is of astonishing use to form the judgment, and to augment the natural intelligence of a people. That is in my opinion its greatest advantage. We ought to consider it as a free school—always open, where every juryman comes to inform himself of his rights,—where he enters into daily communication with the most instructed and most enlightened of the upper classes—where the laws are taught him in a practical manner, and placed within the reach of his understanding by the exertions of counsel, the instructions of the Judge, and even by the passions of the parties in the cause."—*Tocqueville. De la Democratie en Amerique,* tom. 2, p. 185.

affords to the minds of the Jurors themselves. It is an education unattainable in any other way, superior for certain purposes to all others, and which acting through many years, has gone a great way towards making the people of England what they are.

Sensible of this, while we are proposing to abolish it, "in modern times all free States have adopted trial by jury, generally in both civil and criminal cases; always in criminal. It is not easy to overrate the importance of this function in the State, or the benefit which the people derive from the exercise of it." .... "They are thus habituated to public business of the gravest and most important description. They become conversant in the laws by which their rights are defined, and their duties regulated. They learn the nature of the Government under which they live, in its most essential branch. They act and observe under the superintendence and instruction of a virtuous, a learned, and an experienced functionary. Withdrawn from all the turmoil of the popular assembly, its violence, its rashness, its deafness to reason, its abnegation of fairness and candour, they bear a part in a solemn and important discussion, which can only be conducted by rational measures, and determined according to the truth of the case alone. They are engaged in an inquiry where truth only is the object of pursuit, and all matters are disposed of on

their real merits. The political education of the people is incalculably forwarded by this proceeding, their moral habits are much improved by it. There is nothing more certain too, that unlike the other powers reserved in the people's hands, their judicial office is performed, and all its precious benefits secured, without any risk being run of evil."*

But Jurors are, sometimes it is said, stupid, ignorant, easily deluded. Be it so. Is the institution to blame? Is it, therefore, to be abolished? No doubt it would work better, if by education better materials were provided for it. We should all better discharge our duties to the State, were we all more active, conscientious, and intelligent. But no one argues, that we ought not to discharge our duties towards the State at all, because we do not discharge them in the best possible manner. Consider, moreover, what those persons who are now Jurors, would have been without the institution. And what better remedy there can be for their defects, than the discipline which they undergo while in the jury box. But granting that some do remain stupid, yet all receive lessons of fairness, and are taught to love fair play in others. Every trial is a public lecture in impartiality. The Jurors at the very outset of the proceedings, before the eyes of the assembled country, are sworn to

* Political Philosophy, by Lord Brougham, part 3, c. xxii. p. 187.

impartiality. The facts, with the bearing of those facts on both sides, are laid fully and fairly before them; the law of the Country explained to them, their own sense of duty quickened, and the responsibility of their office put strongly and vividly before them.

After all this, an absurd verdict may be given. But all absurd verdicts are acquittals. At any rate, the very rare instances the other way may be disregarded, as the mischief can be immediately repaired by the powers of the Crown. Suppose, therefore, that acting under some false impression, Jurors come to a wrong decision in the shape of an absurd acquittal.

What then? they fairly represent the mass of the community from which they are chosen; and if, after a full and patient inquiry, twelve men, indifferently chosen, still think a man not guilty—it is certain that the rest of their class, probably liable to the same false impressions, and having no opportunity of correcting them, would think so too. They would, therefore, have been infinitely disgusted by a conviction. Thus, the administration of justice satisfies the mass of the people, and keeps the nation contented with its laws. How light a thing is the escape of a few guilty men, when weighed against such circumstances. "Unless," says Bentham, "absolute despotism seated in the breast of the Judge be the only eligible form of Government, the mind of the Judge is not the only mind the

satisfaction of which is worthy of regard. So far from it, that it is only in the character of an instrument of satisfaction to some other mind or minds, that satisfaction afforded to the mind of the Judge himself is of any use. In the case of unbridled despotism seated in some one superior breast, as in Morocco, it is of the mind of the despot, and of him alone; in case of any other Government, simply monarchical or in a greater or less degree popular, in which the affections of the public are, or are professed to be an object of regard, *it is the mind of the public*, the satisfaction of which must (if propriety or consistency be regarded) be said to be the ultimate object in view."*

Let us now suppose a Jury, enlightened by the process they have gone through in Court, to convict a prisoner rightly, but in opposition to the feelings of the community. What follows? The matter does not end with the trial. The twelve men go to their several homes, pleased with themselves, proud of the part they have borne in the administration of the laws, and brim full of matter intensely interesting to their neighbours. At home, at the ale-house, at the church-door, at the market table, they talk over the different cases, obstinately defend all the verdicts, praise "my Lord Judge," and think that, though times are bad, Old

* The Rationale of Judicial Evidence, by Jeremy Bentham, vol. 1, p. 253.

England, after all, is the only country for fair play. Such a spirit spreads. The family, friends, and relatives of each Juryman sympathize with him, and become patriots once removed.

Meanwhile, the friends of the prisoners are in no case irritated by the proceedings. They know that the Jurors are taken from the class to which the prisoner belongs; that they were twelve in number, and were all agreed, that of those twelve, few, if any, had the slightest knowledge of the prisoner beforehand; for prisoners usually object to have their neighbours on the Jury; that the Judge (whom the lower orders still regard as a sort of passionless abstraction, wondrously compounded of pure intellect and ermine),* approved of the ver-

* Foreigners seem to entertain much the same opinion. "When one enters the English Courts, one almost always forgets the Jury to give one's whole attention to the Judge, so different does he appear from what we see in other countries. This grave, calm man, possessed of astonishing learning, does not regard himself as the defender of society, as the avenger of crime; he is indifferent to the causes which are about to be discussed before him; he does not desire the conviction of the accused more than his acquittal, the discovery of his secrets more than their concealment; he is only the guardian of the law—his attention is unceasingly fixed on the law, that it may never be misrepresented or violated. He has mounted his tribunal, without even knowing the calendar of the Assizes, without having any idea of the cases which will be introduced before him. He knows neither the name of the parties, nor the object of their actions. All that he learns of it, he learns in the presence of the public, and he is always ready to render account of his impressions as he receives them, for his thoughts and his

dict; and thus it comes to pass, that the only parties dissatisfied with the result of the trials are the prisoners, and that is quite as it should be. How very different would all this be were the same trials to take place, as is proposed, before two Magistrates without a Jury! In the latter case, two men, unsworn, chosen by the Crown from a class high above the range of the prisoner, not liable to be challenged by him, however much he may suspect their partiality—with habits, feelings, modes of thought and life, totally different from his; mixing but little with the lower orders, and never called upon, or having opportunity, to defend or explain their decisions, are to take the place of twelve sworn men of the middle classes, picked out at hap-hazard from the body of the county, and, owing to the invaluable right of challenge, actually assented to by the prisoner, and these two men alone, and unaided, save by their clerk, are to determine summarily and finally the facts, as well as the law, in cases involving the character and

conscience are always open to the public. . . . Among these Judges are many very strong party men: what admiration ought we not to feel for those national habits which prevent them from bearing any recollection of their party while on their tribunal, which cause them to lay aside all their enmities, all their passions, when they put on the robes of their office."—*Sismondi, Etudes sur les Sciences Sociales*, tome i. p. 116. The author states his opinion, that all this proceeds from the calm and beneficent action of the institution of Trial by Jury where it has been long established, and become part of the national habits, and had time to change the character of the Judges, the Bar, and the public.

liberties of upwards of one half of the persons charged with crimes throughout England. To the poorer orders will not this be a revolution?

But not only will the new tribunal be much worse than the old, it will inevitably make the old less good than it was before. The jurors will have fewer cases brought before them, therefore they will have less practice. They will have to try the greater crimes without any experience in trying the less. They will be always new to their work. They will be more likely to commit blunders, and their blunders will all be important.

But if such will be the effects of the measure upon those classes of the community which furnish the Petty Jury, how will it operate upon the existing magistracy? Most men of sense seem agreed in thinking it desirable that persons of independent feeling, of rank, property, and education should form the magistracy of this country. It is better that the influence naturally attaching to such an office should be in their hands than in those of the mere paid functionaries of the Crown. Moreover the exercise of it gives a motive for their residence upon their estates, where their presence and example is of infinite service; it affords a manly, useful, instructive, and ennobling occupation to an important and influential class in the community; it compels them to know something of the laws of their country, and by bringing them into contact with

all other classes it enables them to see personally how those laws are generally received and operate.

Lastly, by means of their gratuitous services, an immense annual expenditure is saved to the country. We thus enjoy an institution peculiar to this country, eminently good and useful, both to the community, and to those who exercise it, and wholly without national cost. A little investigation will shew that the tendency of this measure would be to indispose such men to undertake these services, and to unfit them for their execution.

At present in cases of felony, the magistrate is only the channel through which the criminal law commences its operation. His duties are ministerial, not judicial, he merely entertains a charge, secures the testimony, and after ascertaining that there is a *primâ facie* case against the accused, puts matters in a train for trial. His time is not consumed with the actual trial, he has not the anxiety and labour of balancing all the circumstances of guilt, of inquiring minutely into the defence, and perhaps into the answer to the defence. Neither his influence, nor his character for impartiality is emperilled by his having finally to decide. Popular and kindly feelings towards him are not destroyed by his having to punish. This is his position now, useful, honourable, not very laborious or unpleasant; what will it be under the proposed system? By the returns obtained, it appears that

of the offences now tried by Juries at Courts of Quarter Session, between fifty and seventy-five per cent relate to property under five shillings in value. All these, two Justices will have thoroughly to try. But they will also have many more. Trumpery cases, now never thought worthy of a public trial by jury, cases of malice and petty quarrels, which would not be ventured before the ordeal of a public court, with a county for an audience, will rise upon them from every quarter. Cases have multiplied exceedingly under the Summary Conviction Act for Juvenile Offenders. In the metropolitan districts the increase during the first six months of the first year after passing the Act, over committals during a corresponding period before the Act was 107. The increase during the first six months of the second year was 173.* In the county of Dorset during the last year it has been at the rate of thirty-five per cent.

All these they will have to hear throughout on both sides; unhappy men, *eternum sedebunt*. By every decision they must either disgust one party, by dismissing the application; or ruin the other, by shutting him up in a gaol to undergo the sentence, and bear the brand of a felon. And this, throughout the country, is to be done by men in their own immediate neighbourhood, and among those who know them, and whom they know, and among whom all their lives have to be passed. They are not members of a Jury, probably unknown and

* "Summary Jurisdiction," by Mr. Sergeant Adams, p. 11.

residing at a distance, with a responsibility diluted to nothing by sharing it with ten others, and that, too, after there has been an open trial, where a Court has fairly laid before them the facts and the law on both sides. Here, all the responsibility rests on the shoulders of the two; all is theirs, both of fact and law; and, as they have only themselves to confer with,—no Jury before whom and the public they must sum up aloud the facts, and state what they take to be the law,—what open, present evidence does such a tribunal afford, to satisfy the ignorant, prejudiced, vindictive friends of the convict that the law has not been perverted, that facts were not forgotten, or distorted, or misunderstood?

At the last Summer Assizes at Derby a stout middle-aged man, a witness for the prosecution, was asked in cross-examination why he had delayed so long to give information against the prisoner. He answered, "I did not dare to speak for fear of the prisoner's friends till the days got longer, and I could go home from my work by day-light." And a painful question presented itself,—how when there were these grounds for fear in a witness whose duty was only to give evidence in one solitary case of felony, it would fare with Magistrates in Autumn and Winter evenings, when it became their duty in almost three-fourths of the enormous total of such cases to try, convict, and punish.

It is true that no objections will be made to this measure by the lower orders now. They know

nothing of it, nor will their objections ever appear in the shape of argument or temperate discussion. But a most remarkable phenomenon, is the obstinate, invincible belief of the friends of a prisoner of the lower class in his innocence. And when for a time that class has observed that all offenders of their class only, many of whom they think are obnoxious to the gentry merely as poachers,* as disorderly profligate characters or violent politicians, are handed over to be punished by Justices for offences, the proof of which they do not understand, have not heard, and do not believe in, then will their objections arise in the shape of discontent against the law, and of hatred towards all above them. They will be expressed by burning of ricks, maiming of cattle, and personal violence against those whom they will think rather their persecutors than their judges. "We have had," says a great writer, "the struggle between the Crown and the Nobles—the contest between the Crown and the Third Estate—or the people properly so called. Take heed lest there be another, and a more tremendous one at hand, between the Government and the populace! More doubtful in its issue, and whatever that may

* "A merchant or squire goes into the House of Commons exasperated by the loss of his broad cloth, or the robbery of his fish, and immediately endeavours to restrain the crime by severe penalties."—*Essay on the History of the English Government and Constitution by Lord John Russell*, p. 242.

be, more dreadful in its course, more fatal in its consequences."*

Is it then really intended that country gentlemen should voluntarily undertake the odious task of administering in their own neighbourhood, without the aid or countenance of their neighbours of the middle class who now compose the Jury, by far the larger portion of the Criminal Law of the land? Will they, at such a time as this, in the watchful, jealous state of mind of the lower orders, gratuitously run the risk, or rather incur the certainty, of wide-spread suspicion and dislike, for the sake of a peddling, penny-wise, pound-foolish, money saving, —a saving which should be thus entered in the Treasury books—Item, saved by converting a popular ministerial office† into an odious judicial tribunal, £. s. d. Would they consent to this even now when times are tranquil? How much less then at a time—and such a time will surely again come—when the people of whole districts, be they

* Colloquies on the *Progress and Prospects of Society*, by Robert Southey, vol. i. p. 113.

† It is worth noting, that the existing administration of the Criminal Law has so entirely satisfied the people of England, that "Law" and "fair play" have become synonymous terms in the mouths of all classes. It has become a sporting term—"Give the hare *law*," that is, don't let the dog pounce upon her at once—*summarily*—but give her every fair chance of escape. These straws have their use. Would the phrase have grown up among us under a system of summary conviction? Or, does it even exist in any other language?

mining, or manufacturing, or agricultural, are rendered fierce by distress, and goaded on against their superiors by factious demagogues, to whom agitation is literally daily bread.

Could a more effective method be devised of severing all ties between rich and poor, of making the upper class suspected and odious, the middle class careless, ignorant and sluggish, the lower class dangerous, because justly discontented. In some parts of the country these considerations have peculiar weight. In Lincolnshire, Durham, and probably in other counties, Clergymen are necessarily, from the absence of resident gentry, put into the commission, and act as magistrates. At some Sessions the Bench almost wholly consist of them, there are no other materials of which it can be made. Will the Clergy consent so to nullify their benign influence, to render the Church itself hateful, and paralyze the force of religion among the lower class of their parishioners by becoming the executors of criminal justice? Will their parishioners consent to it? Many may remember in earlier times of political excitement, a strange Janus form placarded on all the walls, and in the hands of all the disaffected, stirring their ill blood into fury. The one face, that of a gentle, mild-looking clergyman, speaking mercy and forgiveness from the pulpit; the other, of a scowling, sharp-featured justice, at his desk, threatening the gaol and the gallows! Yet this was at a time when the Clergy were only

magistrates to commit, not judges and juries, to try, condemn, and punish.

How much more bitter may we not expect these feelings to become; what terrible effects may we not dread from them on the recurrence of such excitement after the proposed alterations are made. If these things are done in the green wood, what may we not expect in the dry?

It has already been stated that the larcenies of property under five shillings in value are from 50 to 75 per cent upon all the cases now tried by Jury at the Courts of Quarter Sessions.—This has been the case when no temptation has existed to understate the value of the article stolen in order to bring the case within the Justice's jurisdiction. This proportion it may fairly be supposed will increase when that temptation comes into play: nor must we lose sight of the constant depreciation of all articles in value. If then all these cases are transferred to a summary tribunal, it is idle to snppose that the Court of Quarter Sessions would continue long in existence with so little left for it to do—at all events the Bar could not afford to attend it. At present the anomaly of a Court, not professionally educated, has the advantage of being watched in every act by Counsel trained in the knowledge of the law, and in the practice of it, before the Judges of the land; whose duty and whose interest it is to note and to check any thing however minutely at variance with that law and

that practice; who immediately and on the spot —before any erroneous impression has been made— may correct any mistake and supply any omission apparent in the summing up. These advantages are perhaps not always agreeable to that Court at the moment, but in truth are of incalculable service to the magistrates, as well as to the public. That very watchfulness compels them in some sort to prepare themselves for the execution of their duty, and to exert themselves in the performance of it. And in any case of legal doubt they have a body of men before them, to whom they can refer for legal information. These things secure to them that public confidence and respect which they now justly possess, and which otherwise they could not retain. Moreover, and this is very important, by these means they become more fit for the discharge of their duties out of Sessions. People are apt to forget that the magisterial office is not an easy one, that it demands the union of many qualities which taken singly are not common, and in combination are very rare, and that even the primary qualification, namely, the power of shutting out from the consideration of a case all evidence that is not material or legally admissible, is only to be attained by much schooling and practice. The following case will serve as an illustration:—A man was tried for stealing a coal-pick, value one shilling and sixpence. The prisoner admitted that he had taken it, but stated that he had done so deliberately, be-

lieving it to be his own which he had lost: he proved that he had lost one exactly resembling it, that he had used it openly, avowing all the circumstances under which he took it. The gentleman who committed him, an active magistrate and a very amiable man, said that he should not have sent him for trial, if his conduct had not been violent and disrespectful. And when it was suggested that such behaviour might perhaps be deemed confirmatory of the truth of the man's story and evidence of his innocence, the suggestion was received with the utmost surprise.

But in truth this habit of mind is of the very stuff of human nature itself. It is almost impossible for any one, however practised, absolutely to shut out from the consideration of a case, all knowledge other than that which he has derived from the evidence. Every man who has had any experience of Quarter Sessions, must have often heard Magistrates commenting upon the acquittal of a prisoner in the following strain:—"That man ought not to have got off—we know him—he has maintained his family on plunder a long while—he has been the plague of the country—his brother has been transported—they are all a bad lot, and the greatest poachers in the neighbourhood." And this without the slightest conception that they had any bias one way or the other!

If such things occur under the present system, what may we not expect under the new!

Let us before we legislate look a little into futurity. Should this measure pass, country justice must get worse. Magistrates will not remain what they are, after they have been for a generation or two without the advantages of instruction and improvement afforded them by attending on Grand Juries, and by having an educated Bar to practise before them in an open and really public Court. The richer and less active class will not long consent to remain objects of the terror and the vengeance of the lower orders. They will decline an office attended with such irksomeness, odium, and personal responsibility. It will then be canvassed for by petty, meddling, officious, uneducated men for the sake of procuring an importance which they could not otherwise attain. "This trust," says Blackstone, "when slighted by gentlemen, falls of course into the hands of those who are not so, but the mere tools of office, and then the extensive power of a Justice of the Peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment."* With tribunals so composed, scattered all over the country, each forming its own ignorant, uncorrected interpretation of the law, each with its own peculiar disability to see the bearing of facts, each with its own *ex parte* information, its own local and personal feelings; prejudices, dislikes, and alarms, would not the

* Blackstone's Com. vol. 4, p. 281.

Criminal procedure of England, instead of being what it now is, and has long been, "the envy and admiration of the world,"* sink down into the miserable mockery of a trial which we hear of as enacted in the Court of a Cadi in Turkey, or of an obsolete Bailli on the Continent.

Then perhaps, when too late, we should lay to heart the counsel of that great Magistrate, Lord Hardwicke—"It is of the greatest consequence to the law of England and *to the subject*, that the powers of the Judge and Jury be kept distinct, that the Judge determine the law and the Jury the fact, and if ever they come to be confounded it will prove the confusion and destruction of the law of England." God grant that his warning be not prophetic!

* *Preface to State Trials*, p. xxv.

THE END.

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